U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0293 BLA

WILLIAM L. BELT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	
	)	DATE ISSUED: 03/28/2017
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (13-BLA-5231) of Administrative Law Judge Larry A. Temin awarding benefits on a claim filed pursuant to provisions of the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 12, 2012.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with sixteen years of underground coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting claimant with sixteen years of underground coal mine employment, and in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer therefore contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on appeal.

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[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 1, 2. His more recent prior claim, filed on August 9, 2004, was denied by the district director on May 24, 2005, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 2 at 5-6.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 8; Hearing Transcript at 17. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

Employer first contends that the administrative law judge erred in finding that claimant established sixteen years of coal mine employment. Employer's Brief at 25-27. Employer argues that the administrative law judge erred in crediting claimant with sixteen quarters, or four years, of coal mine employment from 1969 through 1977 based on quarterly earnings for those years listed on claimant's Social Security Administration (SSA) earnings records.[4] We disagree.

Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

In addressing the length of claimant's coal mine employment, the administrative law judge considered claimant's employment history forms from the current claim and his two prior claims, claimant's testimony regarding his coal mine employment history, and claimant's SSA earnings records. Decision and Order at 4-5. The administrative law judge found that this evidence was "generally consistent," and reflected that before 1978, when claimant began working solely for employer, claimant worked in coal mine employment for Webster County Coal in 1969 and 1970, for Tradewater Mining Company in 1975 and 1976, and for employer in 1976 and 1977. Decision and Order at 5. Analyzing the quarterly earnings listed on the SSA records for those three employers for the years 1969 through 1977, the administrative law judge identified the number of quarters in each year in which claimant earned at least $50.00 from coal mine

[4] Employer does not challenge the administrative law judge's findings that claimant had twelve years of coal mine employment with employer from 1978 through 1989, and that all of claimant's coal mine employment was underground. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employment, and credited him with a total of sixteen quarters of coal mine employment for this period. *Id*.

Employer contends that the administrative law judge erred in crediting claimant with coal mine employment for every quarter in which he earned at least $50.00. Employer's Brief at 27. The Board has held that this is a reasonable method of computation for coal mine employment occurring prior to 1978. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). Therefore, employer's contention is rejected.[5] Employer argues further that the administrative law judge double-counted the fourth quarter of 1976, when claimant had earnings from both Tradewater Mining Company and employer. *Id*. at 27. This argument lacks merit. The record reflects that if the administrative law judge had credited claimant with every quarter of coal mine employment listed on his SSA records between 1969 and 1977 without accounting for earnings with more than one employer in a quarter, he would have credited claimant with seventeen quarters of coal mine employment. Director's Exhibit 8 at 6-7. Thus, the administrative law judge did not double-count the fourth quarter of 1976. Therefore, we reject employer's allegations, and affirm the administrative law judge's finding that claimant had sixteen quarters, or four years, of coal mine employment from 1969 through 1977, as it was based on a reasonable computation method and is supported by substantial evidence.[6] *See Muncy*, 25 BLR at 1-27. We therefore affirm the

[5] We also reject employer's argument that the administrative law judge erred by not using an income-based calculation method set forth at 20 C.F.R. §725.101(a)(32)(iii) for cases in which the beginning and ending dates of coal mine employment are not established, or where the miner's employment lasted less than a calendar year. Contrary to employer's argument, that formula is not "mandatory," Employer's Brief at 27, but is a suggested method for calculating the length of coal mine employment, which "the adjudication officer may use . . . ." 20 C.F.R. §725.101(a)(32)(iii).

[6] By letter dated December 7, 2016, employer submitted supplemental authority to the Board, in the form of the Sixth Circuit's recent decision in *Aberry Coal, Inc. v. Fleming*, 843 F.3d 219 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310 (6th Cir. 2017). In *Fleming*, the court held that the administrative law judge erred in crediting the claimant with at least fifteen years of coal mine employment because he did not explain his analysis, he double-counted two years, and he failed to resolve the conflicts in claimant's testimony regarding his employment history or the conflicts between claimant's testimony and his Social Security Administration (SSA) earnings records. *Fleming*, 843 F.3d at 315-16. In the present case, the administrative law judge's analysis is consistent with *Fleming*, because the administrative law judge explained his analysis of the evidence, he did not double-count any quarter, and employer does not dispute the administrative law judge's finding that claimant's testimony, employment history forms,

administrative law judge's finding that claimant had a total of sixteen years of underground coal mine employment.[7]

Total Disability

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief at 14-15. Employer's contention has merit.

The administrative law judge determined, pursuant to 20 C.F.R. §718.204(b)2)(i) and (ii), that the new pulmonary function studies were predominantly non-qualifying[8] for total disability, and that all of the new arterial blood-gas studies were non-qualifying. Decision and Order at 7-9, 18-19. Because there is no evidence in the record indicating that claimant has cor pulmonale with right-sided congestive heart failure, the administrative law judge further found that claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 18 n.41.

In determining whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Chavda, Selby, and Zaldivar. The administrative law judge law judge found that claimant is totally disabled, based on the opinions of Drs. Baker and Zaldivar.[9]

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and SSA earnings records were generally consistent with each other. Decision and Order at 4-5; Employer's Brief at 25-26.

[7] We note that in challenging the administrative law judge's use of earnings of at least $50.00 to credit claimant with a quarter of coal mine employment, employer argues that this method led the administrative law judge to improperly give claimant full credit for four quarters, one in 1969, two in 1970, and one in 1975. Employer's Brief at 27. However, even without those four quarters, claimant would still have at least fifteen years of underground coal mine employment.

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The administrative law judge discounted Dr. Chavda's opinion that claimant is totally disabled, because he found that Dr. Chavda based the opinion on an April 2012

Dr. Baker diagnosed claimant with a moderate obstructive impairment, and opined that claimant "does not have the pulmonary ability to perform the duties required in his last coal mine employment." Claimant's Exhibit 4 at 3. Dr. Baker indicated that claimant's job was to operate a continuous miner or cutting machine, which required him to lift sixty to eighty pounds and walk for up to half the day. *Id*. at 1; *see also* Employer's Exhibit 10 at 22-23, 31-33, 38, 40. Dr. Baker further noted that claimant would have difficulty routinely lifting over twenty pounds. Employer's Exhibit 10 at 38. Dr. Zaldivar reviewed the medical evidence of record and opined that "there was no [evidence of] significant disability" until Dr. Baker's June 23, 2015 examination, the most recent of record. Employer's Exhibit 15 at 9. Based on the pulmonary function study values obtained by Dr. Baker, reflecting an "FEV1 . . . below 2 liters," Dr. Zaldivar opined that "[s]uch impairment will prevent [claimant] from performing heavy labor." *Id*. In his report, Dr. Zaldivar summarized Dr. Selby's statement that claimant worked as a cutting machine operator, and Dr. Baker's statement that claimant had to lift sixty to eighty pounds. *Id*. at 2, 5.

The administrative law judge credited the opinions of Drs. Baker and Zaldivar because he found that the physicians "show[ed] an innate understanding of [claimant's] exertional requirements," and explained why claimant was unable to perform his usual coal mine work even though his objective studies were generally non-qualifying. Decision and Order at 20.

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Baker and Zaldivar to find total disability established without first explaining how claimant's usual coal mine work as he described it constituted heavy labor, or addressing whether the physicians accurately understood the exertional requirements of that job. Employer's Brief at 14-15. We agree.

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pulmonary function study, but did not have an opportunity to review three later studies that reflected improvement in claimant's pulmonary function. Decision and Order at 20. Further, the administrative law judge discounted Dr. Selby's opinion that his September 2012 examination demonstrated that claimant has the respiratory capacity to perform his last job as a cutting machine operator, and that he has no limitation on performing heavy labor. Employer's Exhibit 1s at 5; 11 at 23-25, 36. The administrative law judge found that Dr. Selby acknowledged that claimant's most recent pulmonary function study conducted by Dr. Baker in June of 2015 could reflect a significant decline in claimant's FEV1 and the presence of an impairment, but did not address claimant's ability to work in light of that impairment. Decision and Order at 20; Employer's Exhibit 11 at 25.

A miner is considered to be totally disabled if he or she has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his or her usual coal mine work. 20 C.F.R. §718.204(b)(1)(i). The administrative law judge is required to determine the exertional requirements of claimant's usual coal mine work and then consider them in conjunction with the medical reports assessing disability. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). The miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The administrative law judge summarized claimant's hearing testimony that he last worked running a cutting machine, during which he wore a tool belt weighing ten to twelve pounds, walked about a mile each day, and lifted and carried boxes of bits for the cutting machine. Decision and Order at 4. According to claimant, each box weighed ten to twelve pounds, and he lifted and carried two at a time. *Id.* He added that the bits were changed ten to twelve times a shift, when they either wore down or broke. *Id*. The administrative law judge, however, did not make a specific finding as to the exertional demands of claimant's usual coal mine work, e.g., mild, moderate or heavy labor, and compare those exertional demands with the opinions of Drs. Baker and Zaldivar. Because the administrative law judge did not perform the analysis required by 20 C.F.R. §718.204(b)(1), we must vacate his finding that claimant established total disability based on the new medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and remand this case for further consideration. We therefore also vacate the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invoked the Section 411(c)(4) presumption.

On remand, the administrative law judge must consider all of the relevant evidence[10] and determine the exertional requirements of claimant's usual coal mine work as a cutting machine operator. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Shortridge*, 4 BLR at 1-539-40. After making that determination, the administrative law

[10] In addition to claimant's hearing testimony and the descriptions of his job recorded by the physicians, the record includes the claim forms in which claimant described his usual coal mine work. Director's Exhibits 1 at 90; 2 at 205; 6 at 2. Additionally, Dr. Baker characterized the exertion required by claimant's job as a continuous miner operator to be "[p]robably . . . light to moderate . . . ." Employer's Exhibit 10 at 32.

judge must reconsider whether the opinions of Drs. Baker and Zaldivar establish total disability.[11]

Further, if reached on remand, the administrative law judge must weigh together all of the new evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. If claimant invokes the Section 411(c)(4) presumption, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[12] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

[11] We reject employer's argument that the administrative law judge did not explain why he declined to credit Dr. Selby's opinion that claimant is not totally disabled. Employer's Brief at 15. The administrative law judge explained that he discounted Dr. Selby's opinion because the doctor did not address claimant's ability to work in light of the results of his most recent pulmonary function study, which Dr. Selby acknowledged could reflect the presence of an impairment due to the decline in claimant's FEV1 value. Decision and Order at 20. As employer does not challenge the substance of the administrative law judge's credibility determination with respect to Dr. Selby, that determination is affirmed. *See Skrack*, 6 BLR at 1-711.

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

In evaluating whether employer disproved the existence of legal pneumoconiosis,[13] the administrative law judge considered the opinions of Drs. Selby and Zaldivar, both of whom opined that claimant does not have legal pneumoconiosis.[14] Dr. Selby opined that claimant's obstructive pulmonary impairment was due to "smoking for many years, in association with the development of bronchial asthma in later life." Employer's Exhibit 11 at 26. Dr. Zaldivar attributed claimant's obstructive pulmonary impairment to smoking, and to remodeling of the lungs caused by smoking and by asthma unrelated to coal mine dust exposure. Employer's Exhibit 15 at 9.

The administrative law judge discounted Dr. Selby's opinion, in part, because he found that the doctor generally ignored the possibility that claimant's obstruction could have multiple causes, and thus did not adequately explain why he concluded that claimant's sixteen years of coal mine dust exposure did not contribute to, or aggravate, his obstruction, along with smoking and asthma. Decision and Order at 25. Further, the administrative law judge found that Dr. Zaldivar did not persuasively explain why, even assuming that claimant has non-occupational asthma and smoking-related obstruction, claimant's sixteen years of coal mine dust exposure did not also contribute to his impairment. *Id*. at 26.

Employer contends that the administrative law judge erred in discounting the opinions of Drs. Selby and Zaldivar because, employer argues, the administrative law judge misapplied the preamble to the 2001 regulatory revisions when he stated that the effects of coal mine dust exposure and smoking are additive in causing obstructive impairments. Employer's Brief at 16-21. Moreover, employer contends, contrary to the administrative law judge's finding, Drs. Selby and Zaldivar explained why they opined that claimant does not have legal pneumoconiosis. *Id*. at 17-19, 20-21.

We need not address employer's allegation regarding the administrative law judge's reference to the preamble. In light of the definition of legal pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Selby and Zaldivar, because he found that the physicians failed to adequately explain how they concluded that claimant's sixteen years of coal mine dust exposure did not contribute to, or aggravate, his obstructive pulmonary impairment. *See* 20 C.F.R. §718.201(b)(including

[13] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 22-23.

[14] The administrative law judge also considered the opinions of Drs. Baker and Chavda diagnosing claimant with legal pneumoconiosis, in the form of an obstructive impairment due to both smoking and coal mine dust exposure. Decision and Order at 26.

within legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Substantial evidence supports the administrative law judge's credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the administrative law judge permissibly discredited the opinions of Drs. Selby and Zaldivar,[15] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis,[16] we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Selby and Zaldivar that claimant's pulmonary impairment was not caused by pneumoconiosis, because Drs. Selby and Zaldivar did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); Decision and Order at 27-28. Accordingly, we affirm the administrative law

[15] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Selby and Zaldivar, we need not address employer's remaining arguments regarding the weight he accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[16] Employer argues that the administrative law judge failed to adequately resolve conflicting evidence when he found that claimant smoked for at least thirty-five years, and therefore erred in crediting the opinions of Drs. Chavda and Baker diagnosing claimant with legal pneumoconiosis. Employer's Brief at 6-14, 21-25. Because those opinions do not support employer's burden to establish that claimant does not have legal pneumoconiosis, we need not address employer's argument.

judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's disability is due to pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

In summary, if the administrative law judge, on remand, finds that claimant has established total disability, claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309 and will have invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. In that case, in light of our affirmance of the finding that employer failed to rebut the presumption, claimant will be entitled to benefits. If the administrative law judge finds that total disability is not established, however, he must deny benefits, as claimant will not have invoked the Section 411(c)(4) presumption or established a necessary element of entitlement under 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge